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Supreme Court, U.S.
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No. 99-2060

IN THE
Supreme Court of the United States

WESTERN ATLAS, INC.,

Petitioner,

v.

ALEX PENNINGTON and HAROLD G. CUNNINGHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Objection to Petition for Writ of Certiorari	1
Objection to Question Presented	1
Basis for Jurisdiction	1
Statement of the Case	2
The Underlying Dispute	4
A. Western Failed to Inform this Honorable Court that Mr. Cunningham and Mr. Pennington's Firing Took Place in Context of Strategy to Reduce Pension Costs, Regardless of the Law.	4
Reasons for Denying the Writ	9
I. The Split Of Circuits That Western Alleges Is Artificially Created By The Omission Of Details Of Western's Plan To Reduce Pension Costs, And No Basis Exists For The Claim Of A Circuit Split.	9
II. Sixth Circuit Did Not Rely On Lost Opportunity Theory.	10

Contents

Page

III. Western Was Found To Have Purposefully Misled The Sixth Circuit Court Of Appeals. 13

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Clark v. Coats & Clark, 990 F.2d 1217 (11th Cir. 1993) 10

DeWitt v. Penn-Del Directory Corp., 106 F.3d 514 (3d Cir. 1997) 10, 12

Dister v. Continental Group, 859 F.2d 1108 (2d Cir. 1989) 9, 10

Feldman v. America Memorial Life Insur. Co., 196 F.3d 783 (7th Cir. 1999) 10

Henson v. Liggett Group, Inc., 61 F.3d 270 (4th Cir. 1995) 10

Kinkead v. Southwestern Bell Tele. Co., 49 F.3d 454 (8th Cir. 1995) 11, 12

Lehman v. Prudential Insur. Co. of America, 74 F.3d 323 (1st Cir. 1996) 9, 11

Rogic v. Mallinckrodt Medical, Inc., 917 F. Supp. 671 (E.D. Mo. 1996) 12

Shores v. Lucent Tech, Inc., 203 F.3d 822 (4th Cir. 2000) 12

Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997) . 10

Cited Authorities

Page

Turner v. Schering-Plough Corp., 901 F.2d 335 (3d Cir. 1990) 11, 12

Statutes:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 1140 ..... 1, 2, 3, 9, 15

Rule:

Sup. Ct. R. 15.2 ..... 1, 2, 3, 4, 9, 11, 12

Other Authorities:

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Cong. & Admin. News, 5038 ..... 2, 9

H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4639 9

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

After losing its appeal in a unanimous decision of the U.S. Court of Appeals and a unanimous denial of a request for review en banc by the Sixth Circuit Court of Appeals, Western Atlas, Inc. ("Western") now comes to your Honorable Court, requesting a Writ of Certiorari.

OBJECTION TO QUESTION PRESENTED

Western has presented a legal question which is irrelevant to this case, and that is whether a "lost opportunity" to accrue additional pension benefits satisfies a prima face case under ERISA, 29 U.S.C. § 1140. (Writ pg. 7)

This is not a "lost opportunity" case. Western manufactured this so-called "lost opportunity" doctrine by omitting critical facts which support the district court and the Sixth Circuit's finding of Western's motivation to reduce pension costs in the prima facie case. (Writ pg. 3-6) Sup. Ct. R. 15.2. This factual- not legal-argument has been rejected, first, by a federal jury, and then by the Honorable William O. Bertelsman, who adopted the jury's findings, then by the panel for the Sixth Circuit Court of Appeals — Circuit judges Keith, Norris and Clay. (J.A. pg. 5a-7a, 13a-23a) Western was then even denied an en banc hearing by each and every judge of the Sixth Circuit. (J.A. pg. 26a)

BASIS FOR JURISDICTION

On February 7, 2000 the U.S. Court of Appeals for the Sixth Circuit panel consisting of circuit judges Norris, Keith and Clay, dismissed Western's appeal on the merits. The

opinion admonished Western's "misrepresentations", including pasting together language from two cases in order to strengthen their "misleading" and "inaccurate" argument. (J.A. pg. 17a-18a)

A petition for rehearing and a hearing en banc was unanimously rejected on March 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition must be denied as a matter of law, justice and out of respect for Supreme Court Rule 15.2. As every court that has heard this case has recognized, the facts of this case do not implicate the "lost opportunity" doctrine. Indeed, the "lost opportunity" doctrine does not exist in the Sixth Circuit or any court. Nor is the law "conflicting" or "confused" on the question of a prima facie case for ERISA, 29 U.S.C. § 1140 which makes it "unlawful for any person to discharge . . . a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140; H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Cong. & Admin. News, 5038, 5110.

Every circuit in this nation follows the same statutory definitions for a prima facie case. The elements are the same, and the courts follow the exact language of the statute enacted by Congress: (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of the right the employee may become entitled to.

Alex Pennington and Harold Cunningham presented evidence to meet this classic standard which proves that

Western took action for the purpose of interfering with the attainment of pension rights to which they may become entitled. 29 U.S.C. § 1140. The Honorable William O. Bertelsman applied this test in his opinion and the Sixth Circuit affirmed.[1]

This is the same straight-forward prima facie requirements accepted by every circuit in this nation. The decisions of the jury, the judges, the panels and the entire circuit, were completely in keeping with the law, and never in any way conflicted with the decisions of other circuits or departed from the accepted proceedings.

Indeed, Western is in violation of Supreme Court Rule 15.2 as it misstates both the facts and the law on the issue which if fully and properly stated, would lead this Court to deny Western's petition for certiorari. Western omitted all of the facts that showed it had taken actions for the "purpose of interfering" with protected rights of Mr. Pennington and Mr. Cunningham. (Writ pg. 3-13; 12/11/97 Tr. pg. 98 & 102; 12/8/97 Tr. pg. 11-12; 12/10/97 Tr. pg. 25 & 44-45; J.A. 3a-4a, 11a-12a, 19a, 23a)

Indeed, the facts omitted by Western are the very ones that bring the district court and the Sixth Circuit's decision completely in line with other circuits. In fact, when placed in their proper factual context, even the cases cited by Western demonstrate the clarity and uniformity of the law followed by all circuits in defining a prima facie case.

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1. Hon. William O. Bertelsman found that the proper test is: (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of the right the employee may become entitled to. The Sixth Circuit affirmed by applying the same test. (J.A. 5a, 17a, 23a)

THE UNDERLYING DISPUTE

In violation of Supreme Court Rule 15.2, Western has omitted the **critical facts** which show that Western systematically and purposefully interfered with its employees' pension benefits. (12/10/97 Tr. pg. 25, 44-45; 12/8/97 Tr. pg. 11-12; J.A. 4a-5a, 19a) It is these facts that lead the federal judge, federal jury and the entire Sixth Circuit to unanimously find a "prima facie case".

The critical factual omissions by Western are as follows.

A. Western Failed to Inform this Honorable Court that Mr. Cunningham and Mr. Pennington's Firing Took Place in Context of Strategy to Reduce Pension Costs, Regardless of the Law.

In 1993, Harold Cunningham, an engineer, and Mr. Pennington, an inspector, were shocked when they were terminated as part of a RIF after 37 and 27 years, respectfully, of loyal and excellent work performance for Western and its predecessor, Litton Industries. (12/8/97 Tr. pg. 6, 13; Tr. 12/11/97 pg. 93; 12/10/97 Tr. pg. 84-8[illegible] 12/9/97 Tr. pg. 57-58; 12/9/97 Tr. pg. 60; 12/11/97 Tr. 136; J.A. 2a, 3a, 12a-13a)

Since 1993, they have had to live on meager pensions of $7,692.00 and $12,276.00 annually, one-half of the **pensions** they would have received had they worked to age 65, without the security of health insur[illegible]ce they would have received. (12/8/97 Tr. pg. 19; 12/10/97 Tr. pg. 53; Plaintiffs' Trial Ex. 80; J.A. 2a-3a, 10a-11a)

The firing of these employees come as part and parcel of a well thought out and documented strategy to reduce "expenses", including **pension** costs. In 1992 and 1993, indeed, Western sought to save $12,262,176.71 in **pension** and medical savings by offering early retirement to all older employees. (12/11/97 Tr. pg. 33-34; Plaintiffs' Trial Ex. 39; J.A. 5a, 11a)

This effort began in 1992, when Keith Wheeler, the president of the Material Handling Division of Litton Industries, and Barbara Carr, who worked in Human Relations, announced they were seeking ways to reduce expenses, and they did not care about lawsuits.[2] Mr. Wheeler

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2. Western in its Writ states that the purpose of the spreadsheet was to reduce salaries and medical costs. However, the actual purpose was much broader in scope to include expenses, as shown by Mr. Parsley, the manager of Western's Systems Analysis Engineering's, testimony:

. . .

Q. Did you ask them if they were concerned about lawsuits?

A. I explained my concern about what they were asking me to do.

Q. Okay. And what was their response?

A. Their response was basically that that shouldn't be a concern of mine; that they were concerned about getting the information; that they were not concerned about lawsuits. They were concerned about getting the information and operating the company.

(Cont'd)

and Ms. Carr demanded that Mr. Parsley modify a Lotus spreadsheet that showed the costs of employees, including **pension** and medical costs for senior employees, like Mr. Cunningham and Mr. Pennington, for a company whose cost of benefits averaged 34% of pay, ballooning in the final years of employment. (12/10/97 Tr. pg. 25, 44-45; Plaintiffs' Trial Ex. 48; J.A. 4a-5a, 10a-11a)

Once this information was gathered, Mr. Gable, the head of engineering, told Mr. Cunningham and the three other senior project engineers that they were marked for layoff, but their names were removed on the advise of Litton lawyers. (12/9/97 Tr. pg. 95; 12/10/97 Tr. pg. 114; J.A. 12a)

(Cont'd)

Q. Did they state that they would worry about lawsuits in the future?

A. There was reference to that.

Q. Did they discuss wanting to reduce expenses?

A. Yes, they did.

Q. And what were those expenses they wanted to reduce?

A. They were looking to reduce salaries. They were looking to reduce medical costs. Those were the two that I recall.

. . . .

(Parsley Tr. pg. 11-12.)

In 1992, Mr. Hines was hired to "interface" with employees, and recruit new employees. (12/11/97 Tr. pg. 43; J.A. 12a) He **actively recruited** at Georgia Tech and other institutions for openings in the engineering department. (12/11/97 Tr. pg. 14-15; J.A. 12a) In February 1993, Western hired 24 new employees. (12/11/97 Tr. pg. 18-19; J.A. 12a)

Hines prepared a reduction in work force memorandum entitled "HIGH RISK" which flagged employees by salary, age, disability, premature births of children, surgeries, and exemption status. (12/11/97 Tr. pg. 52; J.A. 12a) Mr. Cunningham's name was on the "HIGH RISK" list, and his age was highlighted. (12/11/97 Tr. pg. 29; J.A. 12a)

In 1993, all of the senior project engineers either took early retirement or were fired. That same year, Mr. Shirley, one of the senior engineers, took early retirement and was hired back **with no pension benefits**. (12/12/97 Tr. pg. 63-64; J.A. 12a)

During the same time period, Western hired temporary engineers for up to $1,400.00 per week. These "temps" did not **receive any pension benefits**". (Tr. 12/11/99 Tr. pg. 17-18, 20)

In July 1993 Mr. Cunningham and Mr. Pennington rejected an early retirement package. In August 1993, Mr. Cunningham and Mr. Pennington were fired. Mr. Cunningham and Mr. Pennington's supervisors did not make the decision to fire them, rather the Human Resources department made the selections. (12/11/97 Tr. pg. 72; J.A. 12a)

Western's **pension** and savings plan was a combination of a 401k and a standard pension plan. Western contributed part of the funds to the **pension** plan, and **most of the credits escalate in the final years of employment.** (12/10/97 Tr. pg. 25, 44-45; J.A. 4a, 13a)

Had Mr. Cunningham remained employed by Western until age 65, he would have received $23,548.75 per year for his life expectancy of 78.8 years. He currently receives $12,276 per year in **pension** benefits, but no health insurance. (12/10/97 Tr. pg. 25, 53; Plaintiffs' Trial Ex. 80; J.A. 3a-4a, 11a) Mr. Cunningham's **pension** and medical cost to Western would have been $7,110 per year for fiscal years 1994 through 1997. (12/11/97 Tr. pg. 33-34; Plaintiffs' Trial Ex. 39; J.A. 5a, 11a)

Because Mr. Pennington's employment was terminated at age 60, rather than 65, his **pension** was reduced by one-half. He currently receives $7,692 in pension benefits per year for his life expectancy of 79 years, but no health insurance. (12/8/97 Tr. pg. 19; J.A. 2a, 10a) Mr. Pennington's **pension** and medical cost to Western would have been $2,256 per year for fiscal years 1994 through 1997. (12/11/97 Tr. pg. 33-34; J.A. 5a, 10a-11a)

REASONS FOR DENYING THE WRIT

I.

THE SPLIT OF CIRCUITS THAT WESTERN ALLEGES IS ARTIFICIALLY CREATED BY THE OMISSION OF DETAILS OF WESTERN'S PLAN TO REDUCE PENSION COSTS, AND NO BASIS EXISTS FOR THE CLAIM OF A CIRCUIT SPLIT.

ERISA, 29 U.S.C. § 1140, makes it "unlawful for any person to discharge . . . a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140; H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Cong. & Admin. News, 5038, 5110.

ERISA's "enforcement provisions provide for broad remedies redressing or preventing violations of the Act." H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4655. Congress' inclusion of a broad purpose and use of plain language in the statute state its intent that ERISA should be used to remedy conduct such as Western's. Any narrower reading would go against Congressional intent and the plain language of the statute. Again, we bring to this Court's attention that Western omitted any reference to the statutory language or Congressional history in its petition. Sup. Ct. R. 15.2.

Each and every circuit court in this nation has consistently followed the language of the statute in determining what a prima facie is, thus, leaving zero possibility for confusion. *Lehman v. Prudential Insur. Co. of America*, 74 F.3d 323, 330 (1st Cir. 1996); *Dister v.*

Continental Group, 859 F.2d 1108, 1114-15 (2d Cir. 1989); *DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 522 (3d Cir. 1997); *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 277 (4th Cir. 1995); *Feldman v. America Memorial Life Insur. Co.*, 196 F.3d 783, 792 (7th Cir. 1999); *Clark v. Coats & Clark*, 990 F.2d 1217, 1223-24 (11th Cir. 1993); *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997).

In this case, the District Court and the Sixth Circuit applied the same uniform test when they recognized that Mr. Cunningham and Mr. Pennington were protected by ERISA and that Western terminated them under circumstances where Western was actively looking for ways to reduce employee benefits. (12/8/97 Tr. 11-13; J.A. 4a-5a, 19a, 23a). In doing so, they followed the same requirements to establish a prima facie case that are being followed by every circuit in the nation: ". . . plaintiffs may establish a prima facie case of [ERISA Sec. 510] discrimination by demonstrating that existence of '(1) prohibited employer conduct; (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. . . .' " *See* cases cited, *supra*; (J.A. 5a, 14a, 23a)

II.

SIXTH CIRCUIT DID NOT RELY ON LOST OPPORTUNITY THEORY.

Western argues that the Sixth Circuit diverted from the other circuit courts by finding a prima facie case based solely upon a finding that Mr. Cunningham and Mr. Pennington lost the opportunity to accrue additional benefits. (Writ pg. 7) This is a case where Western omitted facts in its Petition which show that Western was actively looking for

ways to decrease its costs associated with employee benefits, and that it was not concerned with violating ERISA.

Pursuant to Supreme Court Rule 15.2, it is counsel's obligation to note to the Court that Western misleadingly cites *Lehman v. Prudential Insur. Co. of America*, 74 F.3d 323 (1st Cir. 1996); *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990); and *Kinkead v. Southwestern Bell Tele. Co.*, 49 F.3d 454 (8th Cir. 1995) in support of its proposition.

Lehman is irrelevant as the court did not address the issue of a prima facie case; *Turner* and *Kinkead* are distinguishable from the instant case where there the plaintiffs produced no evidence as to "purposeful" interference with rights.[3] In *Turner* the plaintiff proceeded solely on evidence of the loss of additional benefits through

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3. *Lehman v. Prudential Insur. Co. of America*, 74 F.3d 323, 330 (1st Cir. 1996) ("... We again assume arguendo, without deciding, that Lehman set forth a prima facie case."); *Kinkead v. Southwestern Bell Tele. Co.*, 49 F.3d 454, 457 (8th Cir. 1995) ("... Kinkead has presented no evidence that her termination was motivated by a desire to prevent her application for additional disability benefits. Thus, she failed to establish even a prima facie case of interference with the attainment of additional benefits. ..."); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990) ("... where [deprivation to accrue additional benefits] is the only deprivation, a prima facie case required some additional evidence suggesting that pension interference might have been a motivating factor. In this connection, we note that the record contains no evidence that the savings to the employer resulting from Turner's termination were of sufficient size that they may be realistically viewed has a motivating factor. Indeed, there is no evidence at all about economic consequences to Schering that flowed from Turner's termination. ...")

more years of employment. He did not produce any evidence of motivation. *Turner v. Schering-Plough*, 901 F.2d at 348.

In *Kinkead* the plaintiff only produced evidence that her supervisor was aware of her claims of continuing medical disability. She did not produce any evidence of motivation. *Kinkead v. Southwestern Bell Tele. Co.*, 49 F.3d at 457.

The Sixth Circuit did not take a groundless leap to find a prima facie case merely because there was a loss of pension benefits.[4] Rather the Sixth Circuit found a prima facie case that showed Western purposely deprived Mr. Cunningham and Mr. Pennington of benefits.[5] (J.A. 2a-6a; 16a-19a, 23a)

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4. Western's contention that the Sixth Circuit relied on a "proximity theory" is also manufactured. (Writ pg. 12) There is no such theory, and each case relied upon by Western is factually distinguishable from the case at bar in that here Mr. Pennington and Mr. Cunningham produced evidence of Western's motivation to reduce pension benefit cost. *See Rogic v. Mallinckrodt Medical, Inc.*, 917 F. Supp. 671, 680-81 (E.D. Mo. 1996) (claim that plaintiff may have received larger benefits does not state a prima facie claim under ERISA. Plaintiff failed to establish a prima facie case that interference was a motivating factor); *DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997) (where only evidence is savings to Penn-Del and its Plan is not sufficient to be a motivating factor); *Shores v. Lucent Tech, Inc.*, 203 F.3d 822 (4th Cir. 2000) (table) ("... only evidence to infer discriminatory intent is this so-called temporal proximity of three days....").

5. Western's argument that the Sixth Circuit incorrectly relied upon evidence of age discrimination is specious at best. Western omitted the fact that the pension credits escalate in the final years of employment. (Writ pg. 3-5; J.A. 4a, 13a). Therefore, Western's statement that "... the expert's testimony on this point did not mention pension obligations or have any bearing on the ERISA claim" is misleading. (Writ pg. 10) Sup. Ct. R. 15.2.

III.

WESTERN WAS FOUND TO HAVE PURPOSEFULLY MISLED THE SIXTH CIRCUIT COURT OF APPEALS.

This is not the first time that Western has made misrepresentations in an effort to overturn the decision or to drag out a case involving two elderly gentlemen. Mr. Cunningham, age 66, and Mr. Pennington, age 69, may not be able to last out the test of time and be forced to settle out of financial necessity. In its opinion, the Sixth Circuit admonished Western for its misleading and inaccurate arguments:

> . . . Defendant claims that *Rush* supports his position that the district court erred in concluding that Plaintiffs established a *prima facie* sec. 510 case. However, upon close examination of Defendant's argument, **one observes that Defendant is not quoting from the facts of *Rush* in his brief on appeal to this Court, but from a case issued by the United States Court of Appeals for the Fifth Circuit upon which *Rush* relied.** See Defendant's Brief on Appeal at 14 (quoting *Clark v. Reistoflex Co.*, 854 F.2d 762, 771 (5th Cir. 1988) without attribution to that case). **Moreover, Defendant's quotation from the *Clark* case is inaccurate to the extend that Defendant added language from the *Rush* opinion to the *Clark* quote.**

> **Defendant's inaccurate and misleading argument aside, ...**

(J.A. 17a-18a) (emphasis added).

Western is aware that, since 1993, Mr. Cunningham and Mr. Pennington, ages 66 and 69, are living on subsistence level pensions, without health insurance that they never planned for, after decades of loyal and excellent service. Each and every passing day the chances that they will have to accept an unjust settlement out of financial desperation increases.

Mr. Cunningham and Mr. Pennington have demanded payment, but Western instructed the surety **not to pay the judgment** despite its failure to apply for or obtain a stay with this Court.

CONCLUSION

There is no split, confusion or uncertainty in the prima facie requirements under 29 U.S.C. § 1140. Each and every circuit consistently applies an equal standard. This case was decided in accordance with circuit standards.

The writ should be denied, not only for the sake of the law, but also for the sake of justice for two elderly men who deserve finality to this matter.

Respectfully submitted,

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